HSBC BANK MALAYSIA BHD

v.

TAN SRI DATUK AMAR LING BENG SIEW

HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[ORIGINATING SUMMONS NO: 24-184-2001-I]
18 JULY 2003

LAND LAW: *Charge - Order for sale - Particulars to be stated in affidavit in support - Whether particulars prescribed by O. 83 r. 3(3) Rules of the High Court complied with - Whether plaintiff provided valid reasons for non-compliance - Whether plaintiff's application ought to be dismissed*

LAND LAW: *Charge - Order for sale - Default in repaying overdraft facility - Whether plaintiff unilaterally increased limit of facility - Whether demand included unlawful amounts - Whether sufficient grounds for it to be not "just in the circumstances" to order sale*

This was an application by the plaintiff under s. 148(2)(c) of the Sarawak Land Code (Cap 81) ('SLC') for an order for sale of all the one-third undivided right title share and interest held by the defendant in two parcels of land ('the said lands'). The said lands were charged to the plaintiff as security for banking facilities granted by the plaintiff to a company called Dominance Resources Sdn Bhd ('Dominance') in the form of overdraft or general banking facilities. Since Dominance's outstanding balance in respect of the banking facilities granted to it stood at RM61,398,410.17, the plaintiff demanded repayment of the aforementioned sum from the defendant within 30 days of receipt thereof failing which proceedings would be instituted under s. 148 of the SLC to recover the aforementioned sum and interest. Upon the defendant's failure to repay the amount, the plaintiff commenced these proceedings.

The defendant, however, submitted that the affidavit in support of the plaintiff's application for sale did not comply with O. 83 r. 3 of the Rules of the High Court 1980 ('RHC') in that it did not state particulars in respect of: (a) the amount of the advances; (b) the amount of the repayments; (c) the amount of any interest or instalments in arrears at the date of issue of the originating summons or at the date of the affidavit; and (d) the amount remaining due under the charge. It also contended that it would not be "just in the circumstances" to order a sale of his share in the said lands because: (i) the

plaintiff had unilaterally and without his consent increased the limit of the facility stated in each charge; and (ii) the demand made on him was invalid as it included amounts not lawfully due from him.

Held:

[1] The plaintiff had given particulars in respect of two of the four matters that were required to be stated by O. 83 r. 3(3) of the RHC while omitting the other two; thus, the plaintiff had given particulars of the amount of advances as well as the amount remaining due under the charges, but had not made any attempt to state the amount of repayments or the amount of any interest or instalments in arrears at the date of the issue of the originating summons and at the date of the affidavit. It had also failed to give an explanation for not having done as such. Given the fact that O. 83 r. 3(3) of the RHC gives the court power to dispense with the statutory particulars in 'any case or class', if there were valid reasons why the plaintiff was unable to provide the particulars required, then it should have stated them and requested dispensation from providing the particulars. However, in this instance, the plaintiff, having not done so, was clearly in a position of non-compliance under the provisions of O. 83 r. 3(3) of the RHC. In this regard, it was said in the case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* that in hearing an application for sale of charged land, a judge must "ensure that the procedural requirements prescribed by O. 83 of the RHC have been complied with". Therefore, on this ground alone, the plaintiff's application must be dismissed. (pp 771 f-h & 772 a, d)

[2] On the facts, both (i) and (ii) did not constitute sufficient grounds upon which it could be said that it would not be "just in the circumstances" to order a sale of the defendant's shares in the said lands. In respect of (i), while the complaint relied upon by the defendant may form the basis of an action *in personam* for breach of contract against the plaintiff, it did not constitute a ground for saying that it would not be just in the circumstances to order a sale of the defendant's shares in the said lands. With regard to (ii), there was nothing to the point raised by the defendant that the plaintiff should have limited its demand against him to only RM28,360,000. (pp 772 f & 773 a, f)

[Plaintiff's application dismissed.]

Case(s) referred to:

Co-operative Central Bank Ltd v. Meng Kuang Properties Bhd [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467 HC ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(foll)***

Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 CA ***(refd)***

Syarikat Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd [1994] 2 CLJ 729 SC ***(refd)***

Legislation referred to:

National Lande Code, ss. 256(3), 340, Form 16D
Rules of the High Court 1980, O. 83 r. 3(3)
Sarawak Land Code (Cap 81), ss. 132, 148(1), (2)(c)

For the plaintiff - Desmond Sahathevan; M/s Battenberg & Talma
For the defendant - Azrin Ahmat; M/s Idris & Co

Reported by Suresh Nathan

JUDGMENT

Clement Skinner J:

This is the hearing of an application made by HSBC Bank Malaysia Berhad ('the plaintiff), pursuant to s. 148(2)(c) of the Sarawak Land Code (Cap. 81) for an order for sale of all the one-third (l/3rd) undivided right title share and interest held by Tan Sri Datuk Amar Ling Beng Siew ('the defendant') in 2 parcels of land held under title Lot 302 Block 59 Kuching Central land District now Block 36 Muara Tuang Land District and Lot 303 Block 59 Kuching Central Land District now Lot 36 Muara Tuang Land District (hereafter 'the said lands'). The said lands were charged to the plaintiff as security for banking facilities of RM5,000,000; RM3,360,000; and RM20,000,000 granted by the plaintiff to a company called Dominance Resources Sdn Bhd (hereafter 'Dominance'), in the form of overdraft or general banking facilities. The charges executed by the defendant have been duly registered at the Kuching Land Registry Office as Samarahan Instrument No. L1588/1988 on 17 September 1988, as L2198/1992 on 19 November 1992 and as L731/1994 on 12 May 1994 respectively.

As at 2 May 2001 Dominance's outstanding balance in respect of the banking facilities granted to it stood at some RM61,398,410.17. On 21 May 2001, the plaintiff caused its lawyers to make a demand on the defendant for repayment of the aforementioned sum within thirty (30) days of receipt thereof failing which proceedings would be instituted under s. 148 of the Sarawak Land Code to recover the aforementioned sum and interest. The aforementioned demand was sent to the defendant by Registered Post on 22 May 2001.

The defendant not having paid to the plaintiff the amount demanded from him, the plaintiff commenced these proceedings on 27 June 2001. The originating summons herein was personally served on the defendant on 5 September 2001 whenafter he filed two affidavits to oppose the plaintiff's application.

In making this application, the plaintiff's Corporate Recovery Manager one Mr. Khoo Chiew Seng signed a Certificate of Statement of Account showing that as at 27 June 2001 Dominance was indebted to the plaintiff as the sum of RM62,274,798.58 and that interest on overdraft and Banking Credit would continue to accrue at 9.3% per annum and 10.3% per annum respectively from 28 June 2001 until full and final settlement.

The defendant resisted the plaintiff's application for sale on the following grounds:

(1) On each occasion the plaintiff took a charge over his undivided shares in the said lands, the plaintiff had represented to him that the charge was to secure specific limits of money lent to Dominance, ie, initially for a maximum sum of RM5,000,000, then an additional RM3,360,000 in October 1992 and finally yet another RM20,000,000 in April 1994. However, the defendant alleges that the plaintiff had unilaterally and without his consent, increased the maximum limits of the amount lent to Dominance, in breach of the plaintiff's aforesaid representations and clearly stipulated limits set out in each charge. According to counsel for the defendant, "he (the defendant) is discharged of all liability under the various charges on account of the plaintiff and the borrower unilaterally increasing the advances to the borrower (Dominance) to the detriment of the defendant/ chargor".

(2) The demand for payment made by the plaintiff is bad in law, invalid and ineffectual as the plaintiff had wrongfully and improperly issued a demand far in excess of the limits stipulated in each of the charges. It was the submission of counsel for the defendant that under the three charges executed, the plaintiff could at best demand a sum of RM28,360,000, but here the plaintiff had issued a demand for RM61,398,410.17 thereby rendering the demand invalid and ineffectual.

According to counsel for the defendant the making of an ineffectual demand against the defendant has had a disastrous effect on the plaintiff's application for sale because he pointed out that in West Malaysia, where a chargee applies for sale of charged land under the provisions of the National Land Code, it has been held by the Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 that a chargor may show cause against the making of

an order of sale (within the meaning of s. 256(3) of the National Land Code) by demonstrating that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale, such as, for example, where the statutory notice (issued in the form of Form 16D) demands sums not lawfully due from the chargee. See *Co-operative Central Bank Ltd. (In Receivership) v. Meng Kuang Properties Bhd.* [1991] 2 CLJ 1144; [1991] 2 CLJ (Rep) 467.

Relying on what was said in *Low Lee Lian*'s case, counsel for the defendant submitted that since there had been an invalid demand made against the defendant here, the plaintiff had failed to meet a condition precedent for the making of an order for sale against him.

Although counsel for the defendant did not say so in so many words, it is obvious to me that what he in effect submits is that in the context of a sale of charged land in Sarawak, there are provisions found in the Sarawak Land Code which are similar to those found in the National Land Code, whereby an application to sell charged land may only be made to court after the chargor has been given an opportunity to remedy the default or breach complained of under the charge. Thus, whereas under the National Land Code such a statutory notice is given in Form 16D, under the Sarawak Land Code, the statutory notice is given in writing pursuant to s. 148(1) and it is only where the chargor in Sarawak fails to comply with such notice that the court may make an order "as in the circumstances seems just" (see s. 148(2)) for the sale of the charged land.

So it is the submission of the defendant that since the demand or notice that was served on him by the plaintiff on 21 May 2001 demanded sums not lawfully due from him, it was invalid and ineffective, which in turn means that the plaintiff had failed to meet a condition precedent for the making of its application for an order of sale.

(3) The affidavit affirmed by Mr. Khoo Chiew Seng on 27 June 2001 in support of the plaintiff's application for sale did not comply with O. 83 r. 3(3) Rules of the High Court 1980 ('the RHC') in that it did not state particulars in respect of:

(a) the amount of the advance;

(b) the amount of the repayment;

(c) the amount of any interest or instalments in arrears at the date of issue of the originating summons or at the date of the affidavit; and

(d) the amount remaining due under the charge.

Before considering the defendant's objections I think it would be appropriate if I first set out the approach I intend to take in deciding this application. Counsel for the defendant has referred me to the case of *Low Lee Lian v. Ban Hin Lee Bank Bhd (supra)*. That was a case concerning an application for sale of charged land under the provisions of the National Land Code, which the learned judge granted. On appeal against the decision, the Federal Court took the opportunity of clarifying and laying down for the guidance of all courts in West Malaysia, the matters which a judge hearing an application for sale under s. 256 of the National Land Code should direct his mind to.

Under the National Land Code, pursuant to s. 256(3) the court shall order the sale of charged land "unless it is satisfied of the existence of cause to the contrary". The Federal Court in *Low Lee Lian* gave the words "cause to the contrary" a narrow and restrictive interpretation and held (per Gopal Sri Ram JCA) that "cause to the contrary" within the meaning of s. 256(3) might be established only in three categories of cases: (i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s. 340 of the National Land Code; (ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for sale; and (iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

As to the matters which a judge should bear in mind when hearing an application for sale of charged land under the National Land Code, the Federal Court said (per Gopal Sri Ram JCA) at p. 51:

> A judge hearing an application under section 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the code. Next, he must ensure that the procedural requirements prescribed by O. 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.

Now, I am aware that although this application is made under O. 83 RHC, the right of the plaintiff to obtain an order for the sale of the defendant's undivided shares in the said lands arises from the statutory remedy provided by s. 148 of the Sarawak Land Code which reads:

> S. 148 (1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give the chargor, his personal representative or assigns, notice in writing that the chargee will resort to all available remedies unless such default is remedied.

(2) If the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court:

(a) for an order entitling him to enter into possession and be registered as proprietor of the charged land;

(b) to receive the rents and profits of the charged land; or

(c) for the sale of the charge land,

and the court after hearing the evidence may make such order as in **the circumstances seem just:** provided that ... (which are not relevant to this application).

(3) The notice under subsection (1) shall comply with the terms of the charge:

Provided that, without prejudice to subsection (4) of section 154, if no period of notice for the purposes of this section is stipulated by the charge, not less than thirty days' notice shall be given.

It will be seen from the above that whereas under the National Land Code the court will order a sale of charged land unless the chargee shows "cause to the contrary", in the case of an application for sale under the Sarawak Land Code the court will make such order "as in the circumstances seems just". Although at first reading the expression "as in the circumstances seem just" appear to confer on the court a very wide discretion, the question remains whether they should be given a narrow and restrictive interpretation as has been done to the corresponding words found in the National Land Code, so that on an application for sale of charged land under the provisions of the Sarawak Land Code, a judge will direct himself in the same way that a judge hearing an application under the National Land Code should?

In my judgment they should be and I say so for the following reasons. In *Low Lee Lian*, the Federal Court explained that there were good reasons of policy for giving the words "cause to the contrary" a restrictive interpretation. This is what his Lordship Gopal Sri Ram JCA said at p. 50:

It must not be forgotten that in the ordinary way, banks and other financial institutions loan moneys deposited with them by their customers to a borrower on the faith of the security of a charge created over the landed property of the borrower, or as here, of a third party. In the event of a default by the borrower, the lending institution normally looks to early recovery of all or a substantial part of the money due to them from a sale of the security. If the courts of this country interpret the phrase "cause to the contrary" appearing in s. 256(3) of the Code liberally, then institutional lenders would lose confidence in their right to realise that security through an order for sale.

> Financial institutions would then become reluctant to lend money to *bona fide* entrepreneurs. Commerce would come to a standstill and the development of land and industry in this country which are largely dependent upon loans from banks would cease.

In my judgment the reasoning found in the above passage would be equally applicable to banks and financial institutions in Sarawak who lend money on the faith of the security of a charge taken under the Sarawak Land Code. If the courts here interpret the phrase "as in the circumstances seem just" in a liberal way, then the same negative effects adverted to in *Low Lee Lian*'s case would manifest themselves here.

Quite apart from the above reasons, the several matters which are referred to in *Low Lee Lian* as constituting cause to the contrary would also be available to a chargor under the Sarawak Land Code to show that it would not be "just in the circumstances" to order a sale. Thus, the provisions relating to indefeasibility of title and the exceptions thereto are set out in s. 132 of the Sarawak Land Code and would be available to a chargor who wishes to bring his case within any of the exceptions to the indefeasibility doctrine housed in s. 132 to show that it would not be just in the circumstances to order a sale of his land. Likewise it would also be open to a chargor under the Sarawak Land Code to show that the chargee has failed to meet the conditions precedent for the making of an application for sale since the Sarawak Land Code sets out in s. 148 the matters which must be complied with by a chargee in enforcing a charge. Similarly, the same general principles of law and equity which a chargor of land under the National Land Code may rely on to resist an order of sale would be equally available to a chargor in Sarawak.

Adopting the approach recommended in *Low Lee Lian*'s case, I now revert to consider the question at hand. In so far as I am required to consider whether the plaintiff has given the appropriate statutory notice referred to in s. 148 of the Sarawak Land Code, I have already stated earlier that the plaintiff sent a notice to the defendant dated 21 May 2001 pursuant to s. 148(1), informing him that Dominance had defaulted in repayment of the banking facilities and that the defendant was required to make payment of the sums then outstanding within 30 days failing which an application for sale would be made. There has been absolutely no complaint in this regard raised by the defendant. From the materials placed before me I am satisfied the plaintiff has given to the defendant the appropriate statutory notice stipulated in the Sarawak Land Code in making this application.

With regard to the question whether the plaintiff has complied with the procedural requirements prescribed by O. 83 RHC, it is the defendant's case that the plaintiff has completely failed to comply with the requirements of O. 83 r. 3(3). It is also the defendant's submission that since O. 83 r. 3 states that the affidavit which is filed in support of an application for sale "must" provide the particulars mentioned in the Order, that constitutes an absolute obligation and does not create the existence of any discretion in the court to dispense with the strict requirements of the rule or to forgive a breach thereof. Counsel for the defendant then cited about 12 cases to me, in which the courts have either said that where the word "must" appears in a rule, it indicates a peremptory mandate as opposed to a mere direction (see *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321 CA), and that the rules of court must be obeyed (see *Syarikat Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd* [1994] 2 CLJ 729).

I must at once say that while I gratefully accept what is stated in the above cases, it is my respectful view that they have no application in the present context as I am not here concerned with the time frame for the filing of affidavits. Contrary to what the defendant contends about the lack of discretion in the court, the Rules Committee must have recognised that it would not be possible in all cases to provide the particulars mentioned in O. 83 r. 3(3) and so in its wisdom has expressly provided in O. 83 r. 3(3) that the court may dispense with the statutory particulars in "any case or class". So clearly, the court does have a discretion to excuse non-compliance by the very rule under consideration. Whether or not that discretion is to be exercised is a different question.

A perusal of the affidavit affirmed by Mr. Khoo Chiew Seng on 27 June 2001, in support of the plaintiff's application shows that of the four matters required to be stated by O. 83 r. 3(3), the plaintiff has given particulars in respect of two of them while omitting to state the other two. Thus the plaintiff has given particulars of the amount of the advances as well as the amount remaining due under the charges but has not made any attempt to state the amount of repayments or the amount of any interest or instalment in arrears at the date of the issue of the originating summons and at the date of the affidavit. There is also no explanation given by the plaintiff for not having done so. Given the fact that O. 83 r. 3(3) gives the court the power to dispense with the statutory particulars in 'any case or class', if there were valid reasons why the plaintiff was unable to provide the particulars required then it should state them and request dispensation from providing the particulars, but without having done so the plaintiff is clearly in a position of non-compliance under the provisions

of O. 83 r. 3(3). I should also point out that the plaintiff did have an opportunity to rectify the omissions as it had in fact filed a further affidavit to exhibit two supplementary debentures which it had omitted to exhibit in Mr. Khoo's first affidavit of 27 June 2001, but for some inexplicable reason the plaintiff did not see it fit to do so. Perhaps this is so because the plaintiff has in its submissions taken the stand that it has complied with O. 83 r. 3(3), and referred me to para. 6 of Mr. Khoo's first affidavit (of 27 June 2001) and exh. 'KCS10' of his second affidavit (of 4 April 2002). I have looked anxiously at para. 6 of his first affidavit and it clearly omits to state the amount of the repayment or the amount of any interest or instalments in arrears at the date of the issue of the originating summons or at the date of the affidavit. And exh. 'KCS10' of Mr. Khoo's second affidavit does not take the matter any further because that exhibit is a Certificate of Statement of Account of Dominance Resources Sdn Bhd as at 27 June 2001 and also shows the portions of the banking facilities which are secured by the charge, but it does not state the particulars which the plaintiff had omitted to give. In this regard, it was said in *Low Lee Lian*'s case that in hearing an application for sale of charged land a judge must "ensure that the procedural requirements prescribed by O. 83 of the Rules of the High Court 1980 have been complied with". On this ground alone the plaintiff's application must be dismissed.

Lastly, on the materials before me, has the defendant shown that it would not be "just in the circumstances" to order a sale of his share in the said lands? It will be recalled that the objection of the defendant here is that (a) the plaintiff had unilaterally and without his consent increased the limit of the facility stated in each charge, and (b) the demand made on him was invalid as it included amounts not lawfully due from him.

In my judgment both the above grounds do not constitute sufficient grounds upon which it can be said that it would not be "just in the circumstances" to order a sale of the defendant's shares in the said lands. What the defendant complains about in ground (a) is that when the plaintiff unilaterally increased the stipulated limits set in each charge, it had acted in breach of the terms set out in each charge. In other words, the plaintiff had acted in breach of contract. But such an allegation cannot be relied upon to oppose an order for sale because as pointed out in *Low Lee Lian*'s case, "it would not be sufficient ... to allege mere breaches by the chargee of the loan agreement between the chargee and the borrower or even of the terms of the annexure to the charge ... An allegation that the chargee acted in breach of contract, while it may give rise to an independent action *in personam*, is insufficient *per se* to defeat the *ad rem* rights of a chargee under his registered charge to an order for sale".

So, while the complaint relied upon by the defendant may form the basis of an action *in personam* for breach of contract against the plaintiff, it does not constitute a ground for saying that it would not be just in the circumstances to order a sale of the defendant's shares in the said lands.

With regard to the defendant's ground (b), a reading of the contents or terms of the memorandum of charge exhibited as 'KCS1' to Mr. Khoo Chiew Seng's affidavit of 27 June 2001 will show that there is nothing to the point taken. Although the charge does specify the sums for which the defendant's undivided shares in the said lands was to stand as security, it contained also covenants on the part of the defendant to pay all amounts outstanding on Dominance's account with the plaintiff whether secured or not, and as principal debtor as well. Thus, by cl. 1(i)(a) the defendant covenanted to "repay on demand all the principal sum and the interest thereon ... or to repay the balance and any or all sums of money arising from the facility ... payable by the chargor/ borrower ... which are now or shall from time to time or at any time hereafter be due or owing or incurred ...". Also by cl. 9(a), the defendant expressly agreed that the charge shall not be discharged "except on payment by the chargor/borrower of not only all moneys secured hereby but also all moneys whether secured by any other charge created by the chargor/borrower in favour of or vested in or owing to the chargee". Further, by cl. 10 the defendant agreed to be principal debtor and if the amount realised by the plaintiff on the sale of the said lands is less than the amount due to the plaintiff, the defendant shall pay the difference between the amount due and the amount realised. And by cl. 12 the defendant agreed that the charge shall be a continuing security for all monies whatsoever "now or hereafter from time to time owing to the chargee by the chargor/borrower whether alone or jointly and severally with another or others whether as principal or severally ...".

So there is nothing to the point raised by the defendant that the plaintiff should have limited its demand against him to only RM28,360,000.

In the result, since the plaintiff has failed to comply with the procedural requirements prescribed in O. 83, I dismiss the plaintiff's application with costs to the defendant. But as pointed out in *Low Lee Lian*, this would not prevent the plaintiff from commencing proceedings afresh because even though the defendant has managed to show that it would not be just in the circumstances just described to make the order the plaintiff has applied for, it does not in substance affect the chargee's right to apply for an order for sale.